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Supreme Court of the United States

October Term, 1975
No. 75-148

FRED J. ZEVCHIK,
Petitioner,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Posture of the Case 1

The Issue 2

The Facts 2

The Trial 3

Argument 7

1. In an action for damages in a case arising under the Federal Employers' Liability Act, no jury question is present on an issue of a servant-physician's negligence in the dispensation of medical care and treatment to a fellow employee unless evidence is introduced concerning the recognized standard of medical care and treatment to be rendered under the same or similar circumstances and evidence is introduced that the physician's care and treatment fell short of the standard except in those cases where the act of negligence complained of is capable of being judged by the ordinary lay jury, without the aid of expert testimony 7

2. Where a party's motion for directed verdict on or dismissal of an issue is overruled, an objection to the court's charge on that issue is neither necessary nor warranted for the purpose of preserving the claimed error for appeal 11

Conclusion 15

TABLE OF AUTHORITIES

Cases

Braswell v. Nickel Plate, 377 U.S. 405 (1964) 9
Davis v. Virginian Railway Co., 361 U.S. 354 (1960) 2, 8, 9, 10, 11, 14, 15, 16
Dunn v. Conemaugh & Black Lick R., 267 F.2d 571 (3rd Cir. 1959) 10
Knobel v. Pennsylvania R. Co., 192 F. Supp. 771, *aff'd*, 296 F.2d 737 (3rd Cir. 1962) 9
Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957) 15
Sacher v. United States, 343 U.S. 1 (1951) 13
Urdang v. Mahrer, 81 Ohio L. Abs. 23, 158 N.E.2d 902 (Ct. of App. 1959) 14
Waller v. Southern Pac. Co., 424 P.2d 937 (Cal. 1967) 10

Texts

4 O. JUR. 2d, *Appellate Rev.*, §831 14

Statutes

Federal Employer's Liability Act 7, 14, 15, 16

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POSTURE OF THE CASE

Petitioner, Fred Zevchik, wrested a $112,500.00 verdict against Respondent, The Norfolk and Western Railway Company at the hands of an Ohio state court jury. The Court of Appeals of Ohio of the Eighth Judicial District reversed and remanded the case for new trial. The Ohio Supreme Court refused to grant Petitioner's Motion to Certify.

THE ISSUE

Petitioner proceeded below on two theories. First, he contended that the railroad physician, who was treating Petitioner, was negligent in sending him back to work before his back had fully healed. The second issue presented to the jury concerned a charge that after Petitioner had returned to work, the railroad forced him to work alone after refusing to respond favorably to Petitioner's request for assistance.

The Court of Appeals reversed on authority of *Davis v. Virginian Railway Co.*, 361 U.S. 354 (1960) on the issue of the physician's negligence. A new trial was ordered on the remaining issue.

THE FACTS

Petitioner was involved in a traffic accident when the company truck he was driving was struck from the rear. He claimed injury in that incident, although no claim was made against the railroad. This accident took place on November 19, 1968. Thereafter, Petitioner was treated by Dr. Edmonds, the railroad doctor. On December 20, 1968, the doctor cleared Petitioner for a return to work.

On December 24, 1968, while lifting a grinder from a truck during the course of his duties as an employee of the railroad, Fred Zevchik claimed he re-injured his back. Petitioner argued below that prior to lifting the grinder from the truck, he called his supervisor in order to obtain a helper. He contended the request for aid was refused.

Petitioner once again returned to the railroad doctor for treatment. Again on January 20, 1969, the doctor sent Mr. Zevchik back to work, this time over Petitioner's protests that he was not yet ready. The additional work, it is claimed, further exacerbated the back condition.

Finally, Petitioner sought out his own physician. After returning several times for very short tours, Petitioner worked no more.

THE TRIAL

The Complaint, in a single cause of action, alleged negligence. But as the trial developed, it became apparent that Petitioner was proceeding on two issues. First, it was contended that Dr. Edmonds, the railroad physician, was negligent in his care and treatment of Petitioner. Second, it was argued that Respondent was negligent in either requiring Petitioner to perform work he was not suited to do or in failing to assist him when assistance was requested.

At the close of Petitioner's case-in-chief Respondent moved for a directed verdict on the issue of Dr. Edmonds' negligence. The motion was overruled. It was renewed at the close of all of the evidence and, again, overruled.

Petitioner, in the Court of Appeals, in the Ohio Supreme Court and now here argues that he never charged Dr. Edmonds with negligence. He characterizes his closing argument charges as "a few chance remarks." Observe then as Petitioner's counsel explains what he conceives as the "issues" and listen to the charges made against Dr. Edmonds. When finished, ask yourself if this Petitioner was attempting to convince the jury that Petitioner

was entitled to a verdict in his favor because the railroad doctor was negligent in his treatment.

> Plaintiff tells the jury—
>
> So there are two factors here: one sending him back to work before he had completely recovered that is an agent of the railroad that was doing that. Of course don't forget that his supervisor could also give him light duty and refused to do so. That is *another* agent of the railroad. And the other is just plain refusing to give him help.... (Tr. 296-97).

The first agent referred to in the quoted material is Dr. Edmonds. Observe then as plaintiff argues his case to the jury.

> [H]e didn't work after that for three months. He couldn't take it. That is what he told you. He couldn't take it. *Dr. Edmonds wouldn't pay any attention to him.* . . . (Tr. 282). (Emphasis supplied throughout.)

Before he goes back to work, he has to be cleared by the company doctor. So he saw Dr. Edmonds who cleared him for full duty, not light duty. *Now I say that was wrong of Dr. Edmonds.* (Tr. 283).

I don't say he is a bad doctor, but I say he didn't believe Fred Zevchik, and I think he made it clear that he didn't believe Fred Zevchik. (Tr. 283).

Well, *frankly I don't believe Dr. Edmonds* and I will tell you two things why: and *I think they are pretty doggone glaring myself.* (Tr. 283).

Now, why in the world did he [Dr. Edmonds] do that if [plaintiff] was in such fine shape? Dr. Edmonds didn't tell us about that. Dr. Edmonds was full of subjective complaints, exaggerated symptoms

and so on and so forth. And he kept talking that way. I thought he would never stop talking about how Fred seemed to be exaggerating, and it sounded to me like he said that he was faking, although he denies [it]. (Tr. 284-85).

Dr. Edmonds kept insisting that he was ready to do full duty, full employment, all the heavy work, too. And he kept sending him back and kept sending him back to work that way rather than let him do the lighter duties available or that were useful things that would not interfere with the operation of the railroad. (Tr. 285).

The damage had been done, as Dr. Zaas says, "Every new insult to those tissues; every new injury contributes to the overall picture." *Every time he is sent back to heavy work, again without a chance to recover completely, before he starts the heavy work, then more damage is done.*... (Tr. 287-88).

Obviously, it is readily apparent that plaintiff is pointing the accusing finger at Dr. Edmonds and arguing that the doctor's treatment was negligence. But, again—

> The potential was there because of the automobile accident. It had given him one little siege during that month off. Edmonds didn't pay any attention to it. Edmonds doesn't even remember him telling him about it. Edmonds says, "Nothing to do with the low back, the accident." (Tr. 295).
>
> *NOW, IT IS NEGLIGENT FOR DR. EDMONDS TO SEND HIM BACK TO WORK?* (Tr. 296).
>
> Well, it would be if he knew the condition of his low back. Edmonds said he didn't know the condition of his low back. *Well, it is negligent for him*

not to find that, but he shouldn't have been back at work at that time, it turns out. (Tr. 296).

IT CERTAINLY WAS NEGLIGENT OF DR. EDMONDS TO SEND HIM BACK TO FULL DUTY IN MAY OF THAT YEAR WHEN DR. ZAAS IS TREATING. (Tr. 296).

IT WAS CERTAINLY NEGLIGENT IN THAT FALL OF THAT NOVEMBER TO SEND HIM BACK TO FULL DUTY, AND FRED WAS TELLING HIM, "THAT I CAN'T DO IT." (Tr. 296).

Petitioner introduced no evidence on the recognized standard of medical care and treatment and no evidence that Dr. Edmonds departed from any recognized standards of care. It was for this reason Respondent sought to remove this as an issue in the case.

ARGUMENT

1. In an action for damages in a case arising under the Federal Employers' Liability Act, no jury question is present on an issue of a servant-physician's negligence in the dispensation of medical care and treatment to a fellow employee unless evidence is introduced concerning the recognized standard of medical care and treatment to be rendered under the same or similar circumstances and evidence is introduced that the physician's care and treatment fell short of the standard except in those cases where the act of negligence complained of is capable of being judged by the ordinary lay jury, without the aid of expert testimony.

As argued here and throughout the appellate courts, there is little relationship between the case Petitioner presents here and the one tried to the jury. It is argued that the railroad has attempted to interject its physician into the work assignment area and thereby convert a garden variety F.E.L.A. case into a more difficult malpractice case.

Petitioner's theory below, and the one plainly argued to the jury, was that Dr. Edmonds was negligent as a physician. Now he claims that Respondent and the Court of Appeals misunderstood. The argument runs that Dr. Edmonds wasn't really negligent as a doctor. He played only a minor role in sending Petitioner back to a job the doctor thought was entirely compatible with the Petitioner's condition. Petitioner says that the railroad was

negligent in not giving him the work the doctor thought was available or negligent in failing to tell the doctor such work was unavailable.

The Court of Appeals gave this *new* position the short shrift it deserves. There is no mistaking *the fact* that the railroad moved for a directed verdict on this issue injected by Petitioner of physician negligence. There is no mistaking *the fact* that Petitioner vigorously opposed the motion. There is no mistaking *the fact* that Petitioner with equal vigor argued physician negligence to the jury. If indeed physician negligence was a non-issue, why did Petitioner object to the railroad's motion?

A review of each case cited by Petitioner reveals that in not one was the railroad physician himself accused of negligence. Each case involved the question of how the railroad responded to a physician's judgment. This case, like *Davis*, involves the physician's treatment and advice as one basis of the railroad's claimed liability.

Davis v. Virginian Railway Co., 361 U.S. 354 (1960) is practically four square with this case. In *Davis*, Petitioner complained that the railroad physician sent him back to work too soon following a leg injury. The second issue involved a charge that a shifting of cars at an accelerated pace in addition to inadequate assistance caused injury.

Davis held:

> Proof of malpractice, in effect, requires two evidentiary steps: evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of plaintiff. *Id.* at 357.

Petitioner Zevchik attempted neither the proof of the standard nor a showing that Dr. Edmonds' treatment fell short of the mark.

The only difference between *Davis* and *Zevchik* is that Davis spelled out his claims in two separate causes of action whereas Zevchik spells his claim out in one cause of action. But it is hornbook law that the issues that develop at trial find their genesis not in the Complaint but in the evidence. Issues set forth in the Complaint that are not the subject of proof wither for lack of substance. Evidence giving rise to an issue demand the attention of the trial court and the jury even if not spelled out with particularity in the Complaint.[1] Petitioner's arguments here and in the two appellate courts through which this case has passed that no attack was made on the doctor are simply not true.

Turning then to the cases relied on by Petitioner we come first to *Braswell v. Nickel Plate*, 377 U.S. 405 (1964). *Braswell* does not aid us here as plaintiff in that case never contended that the railroad doctor was negligent. His Complaint was that his work was too strenuous. This is precisely what Petitioner claimed in his second thrust—the work was too hard without assistance. But Respondent never contended it was entitled to a directed verdict on this issue.

Knobel v. Pennsylvania R. Co., 192 F. Supp. 771, *aff'd*, 296 F.2d 737 (3rd Cir. 1962) is also relied on. *Knobel* had nothing whatever to do with any claim of negligence by a railroad physician. It involved an employee with poor eyesight. The district court held there was sufficient evidence for the jury to find the railroad negligent in

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1. Assuming of course that a wholly new unrelated cause of action is not introduced for the first time during the trial.

assigning a visually handicapped man to work at a job that exposed him to injury by tripping. The case really involved a claim of negligence on the part of the railroad for not following the advice of its own physician.

Dunn v. Conemaugh & Black Lick R., 267 F.2d 571 (3rd Cir. 1959) is a pre-*Davis* case. But again no claim of physician negligence was raised.

Petitioner's reliance on *Waller v. Southern Pac. Co.*, 424 P.2d 937 (Cal. 1967) is likewise misplaced. The evidence disclosed that the railroad concealed plaintiff's true illness from him and suffered him to work in a tense job that hastened his illness to the point he could no longer work. One of the railroad's doctors had even written to plaintiff's wife stating that plaintiff's tense position would aggravate his condition.

This case is best considered and Petitioner's claims most fairly judged when it is recalled that Petitioner was the one who elected to bifurcate his attack on the railroad. No one forced Petitioner to claim the physician was negligent. But since Petitioner did, the railroad sought to remove the issue from the case because of a failure of proof. A construct would be helpful. Let us suppose plaintiff is injured when defendant strikes plaintiff's car in the rear. Plaintiff claims negligence in a single cause of action in his Complaint. At trial he not only seeks to prove the defendant violated a statute in failing to stop or control his car but, in addition accuses the defendant of failing to have his headlights on during the night season. The defendant moves for directed verdict on the headlight specification arguing that plaintiff failed to prove it was dark. The motion is overruled. Defendant appeals an adverse verdict and the Court of Appeals agrees the trial court erred on the headlight issue. The case is reversed and remanded for new trial. At this point in the instant case we are in the same position.

Petitioner, at his peril, elected to nail up as many hooks as he could upon which the jury could hang the hat of a plaintiff's verdict. He now complains because the Court of Appeals took one hook away because of a fatal deficiency in the proof.

2. Where a party's motion for directed verdict on or dismissal of an issue is overruled, an objection to the court's charge on that issue is neither necessary nor warranted for the purpose of preserving the claimed error for appeal.

Petitoner's second argument is a catchall for three separate arguments all of which amount to a claim that if error did intervene in the trial court's refusal to direct a verdict, the railroad "waived" the error.

First, Petitioner claims (p. 11) that because *Davis, supra,* was not cited to the trial court the objection was waived. This is nonsense. True *Davis, supra,* was not cited because counsel was unaware of it until the Motion for New Trial was briefed. But the Transcript adequately demonstrates in unequivocal language the precise basis for the Motion for Directed Verdict and appropriate Ohio authority for the propositioned urged.

The second claim is that counsel for the railroad deceived the trial court by arguing, "I am not saying this is a medical malpractice case." (Pet. Brief p. 12). This type of argument lifting a statement out of context is reprehensible. An explanation is in order. After the railroad made its motion, Petitioner argued that he was not accusing the doctor of malpractice. He claimed that the

issue involving the doctor was pure negligence. This "rose by another name" seemed to be carrying the day. It was then the railroad made the statement that is quoted above. But there was more. The argument succeeded in the trial court but was swiftly rejected by the Court of Appeals. Counsel for the railroad in arguing the motion for direction to the trial court attempted to dissuade the court from following plaintiff's argument—

> No, your honor. I am not saying that that is a medical malpractice case. What I am saying is that the proof required here against the defendant, insofar as the doctor's negligence is concerned, is identical to the proof that would be required in a medical malpractice case and it is on that basis that I make the motion for direction of . . . (Tr. 273).

Petitioner's attempt to mislead this Court into believing that the railroad did not preserve the error below by quoting out of context should receive the attention it deserves.

Third, Petitioner claims that because the railroad did not object to his closing arument concerning Dr. Edmonds' negligence and did not ask the trial court to charge the jury they could not return a verdict against the railroad based on the physician's conduct, the issue was waived. These arguments did not impress the Court of Appeals one iota and deserve no attention here.

There is no requirement for the preservation of error that counsel jump up and down like a jack-in-the-box to repeat objections and re-raise arguments once told the trial court disagrees. Twice the railroad moved for a directed verdict on the issue. Twice the trial court overruled the motion. Now Petitioner tells this Court the error was waived because the railroad did not object to

Petitioner's closing argument about the physician's negligence. And the Court is told the railroad waived the error because it did not demand the trial court cure the error in the charge. This Court has set the standard for a lawyer's conduct and what is expected of counsel once he is told the trial court disagrees—

> [I]f the ruling was adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. *Sacher v. United States,* 343 U.S. 1, 9 (1951).

The trial court obviously was of a view that Petitioner was entitled to present to the jury the issue of the railroad physician's negligence. Having twice overruled the railroad's motion, repeated objection and motions directed to the same issue would have been superfluous and perhaps approached contempt.

Petitioner's final parting salvo, couched as it is in the Conclusion (p. 14) is a direct misstatement of the Ohio two-issue rule. Petitioner claims that the Court of Appeals erred "since the jury found that Zevchik suffered his low back injury on December 24 while at work and that negligence of his supervisor played a part in causing that injury." The statement is made that even if malpractice was a cause of the injury, the verdict could be supported on the other issue.

This was a general verdict. Petitioner did not elect to test the verdict with interrogatories. No one knows whether the jury based its verdict on the issue of Dr. Edmonds' claimed negligence or on the issue of the railroad supervisor's refusal to send Petitioner the requested aid. This case was tried in state court. Ohio follows the two-issue rule. The rule, briefly, is that where a jury verdict

can be supported on two or more theories, the fact that one issue was the subject of an inaccurate charge will not warrant reversal if an issue that would support the verdict was the object of a proper charge.

The rule does not apply where an issue should not have been submitted in the first place. See, *gen.* 4 O. JUR. 2d, *Appellate Rev.*, §831. It is the railroad's contention, of course, that the issue of Dr. Edmonds' alleged negligence should never have been submitted to the jury.

The Court of Appeals did not hold as Petitioner claims that a railroad is exonerated from liability if a plaintiff fails to prove malpractice where a railroad doctor merely approves a man for work. The Court of Appeals did hold, as did *Davis*, that if medical judgment is involved in the decision of whether a man is sufficiently recovered that conduct must be measured by the standards applicable to medical men in the same or similar circumstances.

Insofar as *Urdang v. Mahrer*, 81 Ohio L. Abs. 23, 158 N.E.2d 902 (Ct. of App. 1959) is concerned, the Court of Appeals did not part company with its earlier decision. *Urdang* said that expert testimony was unnecessary in a case involving an elderly woman who fell in a bathroom after being given a barium enema. The court said the jury can decide whether it was negligence to send a seventy-six year old woman to the bathroom without aid after being subjected to the treatment described. Here, medical treatment and judgment was uniquely bound up with Dr. Edmond's repeated advice to Mr. Zevchik to return to work.

The result reached below does not sound the death knell for the F.E.L.A. or railroad employees. *Davis* was applied. It is the law.

CONCLUSION

Petitioner serves up *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957) as though the mere mention of the name would cause a trial or appellate judge to recoil in fear at the prospect of examining the evidence or the law upon which a jury based its verdict. *Rogers* does not stand for the proposition that due process of law shall be dispensed with in F.E.L.A. cases. It does not hold that each and every issue raised by an injured employee is entitled perforce to jury consideration.

The result reached below by the Court of Appeals is consonant with *Rogers*. All *Rogers* says is that the jury must be entitled to consider "whether the *proofs* justify with reason . . . negligence." *Id.* at 506. But it is and has ever been thus that the court decides what is and is not "the proofs." *Davis*, upon which we rely, is not a *pro tanto* reversal of *Rogers* which preceded *Davis* by three years. *Davis* has nothing to do with the principles of *Rogers*.

The *Davis* rule is salutary and hornbook law in every jurisdiction. The principle is simple—laymen are not usually in a position to judge whether one who practices the art of healing has erred, not without assistance from an expert. This Court has announced that if Petitioner seeks to blame the physician for his treatment he must establish the standard of care and measure the physician's treatment against that standard. Whether Petitioner had done that which *Davis* requires of him is a judicial decision.

The scant fifteen years that have passed since *Davis* has seen no change in the law of the nature of the proof required in a physician negligence case. No social, economic or jurisprudential reason exists that suggests *Davis* ought to be re-examined.

If the Congress felt aggrieved by *Davis* it surely has had adequate opportunity to respond. It is not the duty or prerogative of this Court to judicially convert the F.E.L.A. into a Workmen's Compensation Act.

Davis says it all insofar as this case is concerned. The point need not be restated. The Court of Appeals correctly applied *Davis*. Petitioner will have his day in court when this case is retried.

The application for Writ of Certiorari should be denied.

Respectfully submitted,

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